On June 20, 2003, the Lackawanna County Court of Common Pleas, per the Honorable Terrence J. Nealon, issued an order and opinion granting Zymblosky's Petition, striking the Sheriff's deed issued to OSC on the basis of fraud and/or the Lackawanna County Sheriff's want of authority to conduct the sale. Following the issuance of the June 20, 2003 order, OSC filed on appeal to the Pennsylvania Superior Court. The order was affirmed by a panel of the Pennsylvania Superior Court on May 25, 2004.

By order dated August 9, 2004, the Pennsylvania Superior Court denied an application for reargument filed by OSC. Thereafter, by order dated April 26, 2005, the Pennsylvania Supreme Court denied OSC's petition for allowance of appeal.

REASONS FOR DENYING THE PETITION

The decision of the Pennsylvania Supreme Court in denying OSC's petition for allowance of appeal neither decides an important federal question in a way that conflicts with the decision of another state court of last resort or of the United States Court of Appeals, nor decides an important question of federal law that has not been, but should be, settled by the United States Supreme Court. To the contrary, the issues related to the Pennsylvania Supreme Court's denial of OSC's petition for allowance of appeal involve the application of state law. Moreover, OSC's argument that the Pennsylvania Supreme and Superior Courts denied it of equal protection of the law by refusing to provide OSC with an evidentiary hearing was waived by OSC's failure to file a concise statement of matters complained of on appeal in accordance with the Pennsylvania Rules of Appellate Procedure.

I. A STATE COURT DOES NOT DENY A PARTY EQUAL PROTECTION OF THE LAW BY ISSUING AN UNPUBLISHED, NON-PRECEDENTIAL OPINION

Despite OSC's argument to the contrary, a state court does not deny a party equal protection of the law issuing unpublished, non-precedential opinion. In fact, the United States Constitution does not contain an express prohibition against issuing non-precedential opinions. *Hart v. Massanari*, 266 F.3d 1155, 1163 (9th Cir. 2001); *Symbol Technologies, Inc. v. Lemelson Medical, Education and Research Foundation, Limited Partnership*, 277 F.3d 1361, 1367 (Fed. Cir. 2002).

While there is non-binding precedent concluding that a rule prohibiting the use of unpublished opinions as precedent is unconstitutional, that precedent relates to the application of Article III of the United States Constitution. *See, e.g., Anastasoff v. United States*, 223 F.3d 898, 899-905 (8th Cir. 2000), *vacated as moot*, 235 F.2d 1054 (8th Cir. 2000). Notably, the issue in *Anastasoff* and its progeny is whether a court can preclude a party from relying upon an unpublished, non-precedential opinion prosecuting its action. *Anastasoff v. United States*, 223 F.3d at 899. In the present case, however, OSC has argued that the Pennsylvania Supreme and Superior courts denied it equal protection of law by merely issuing an unpublished, non-precedential decision in the case at issue. OSC does not argue that it has been denied the ability to rely upon an unpublished, non-precedential decision in the prosecution of its case.

Moreover, dissimilar to *Anastasoff* and its progeny, OSC fails to argue that Section 37 of the Internal Operating

Procedures of the Pennsylvania Supreme Court, 210 Pa. Code § 65.37, is violative of Article III of the United States Constitution[1]. Rather, without citation to any authority, OSC boldly argues that Section 37 violates its rights to equal protection of the law. However, even assuming OSC's argument can be construed as an appropriate Constitutional challenge, the recent trend has been to reject the non-precedential holding of *Anastasoff*. *See, e.g., Hart v. Massanari*, 266 F.2d 1155, 1180 (9th Cir. 2001); *Symbol Technologies, Inc. v. Lemelson Medical, Education and Research Foundation, Limited Partnership*, 277 F.3d 1361, 1367 (Fed. Cir. 2002).

According to the Ninth Circuit Court of Appeals in *Hart v. Massanari*, the United States Constitution does not contain an express prohibition against issuing non-precedential opinions. *Hart v. Massanari*, 266 F.3d at 1163. Rather, "[t]he common law has long recognized that certain types of cases do not deserve to be authorities, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not. . . ." *Id.*, 266 F.3d at 1180; *see also Symbol Technologies, Inc. v. Lemelson Medical, Education and Research Foundation, Limited Partnership*, 277 F.3d 1361, 1367-68 (Fed. Cir. 2002).

Finally, the Pennsylvania Superior Court recently considered whether the issuance of unpublished, non-precedential decisions is violative of the Vesting Clause contained in Article V, Section 1 of the Pennsylvania Constitution which is similar to that contained in Article III to the United States Constitution. *Schaaf v. Kaufman*, 850 A.2d

1. Note that Supreme Court Internal Operating Procedure § 37(B) allows a court panel, *sua sponte*, or any party or the trial judge, upon motion, to convert the memorandum to a published opinion. 210 Pa. Code § 65.37(B) (1992, as amended, 2003).

655, 658-59 (Pa. Super. 2004). According to the Pennsylvania Superior Court, so long as it renders judgments, whether unpublished, binding, citable or not, it is not strayed beyond the judicial powers granted in the Pennsylvania Constitution. *Id.*

II. A STATE COURT DOES NOT DENY A PARTY EQUAL PROTECTION OF THE LAW WHEN IT FOLLOWS EXISTING STATUTORY MANDATE AND DECISIONAL LAW IN STRIKING A SHERIFF'S DEED IMPROPERLY PROCURED BY A PARTY

OSC further argues that it was denied equal protection of the law when the Pennsylvania Superior Court and lower courts withheld the application of voluminous amounts of established case law.[2] In essence, OSC's Petition avers a deprivation of Constitutional rights as a result of the Pennsylvania courts' failure to follow existing state law. As stated by OSC in its Petition, however, the Fourteenth Amendment to the United States Constitution does not assure uniformity of judicial decisions or immunity from judicial error. *Beck v. Washington*, 369 U.S. 541, 554-55, 82 S. Ct. 955, 963, 8 L. Ed. 2d 98, 110 (1962), *rehearing denied*, 370 U.S. 965, 82 S. Ct. 1575, 8 L. Ed. 2d 854 (1962). Accordingly, "[w]ere it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id.*, 369 U.S. at 555, 82 S. Ct. at 963, 8 L. Ed. 2d at 110.

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2. Assuming, *arguendo*, that the Pennsylvania Superior and lower courts improperly applied established case law, Supreme Court Rule 10 provides, in pertinent part:

> . . . A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Notwithstanding OSC's argument to the contrary, the Pennsylvania Superior and lower courts followed existing statutory and decisional precedent in striking the Sheriff's deed.

THE PENNSYLVANIA SUPERIOR AND TRIAL COURTS PROPERLY APPLIED EXISTING STATUTORY AND DECISIONAL PRECEDENT IN REFUSING TO GRANT OSC A TRIAL BY JURY

OSC argues that it was denied equal protection of the law due to the decisions of the Pennsylvania Superior Court and trial court in refusing to grant it a trial by jury. This argument, however, ignores the clear import of Rule 3132 of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. 3132, which sets forth the procedure for a party to set aside a sheriff's sale.[3] In fact, the language of the Rule specifies that "[u]pon petition," the court may, upon proper cause shown, set aside sheriff's sale. Under Pennsylvania law, therefore, the appropriate method for challenging a completed sheriff's sale is for an aggrieved party to file a petition to set aside the sale in accordance with Pa. R.C.P. 3132, rather than in a jury trial. *See Farmer's First Bank v. Wagner*, 455 Pa. Super. 107, 110 n.3, 687 A.2d 390, 392 n.3 (1997).

In *S&T Bank by Dalessio v. Dalessio*, 429 Pa. Super. 282, 632 A.2d 566 (1993), the Pennsylvania Superior Court had the opportunity to consider whether a party to a Rule 3132 proceeding was entitled to a trial by jury. In rejecting one party's claim that she was entitled to a trial by jury to determine the fair market value of property sold at a sheriff's sale in accordance with Pa. R.C.P. 3132, the Pennsylvania Superior Court held:

3. The verbatim text of Pa. R.C.P. 3132 is attached hereto as Appendix A and is incorporated herein.

Nowhere in Rule 3132 is there a reference to the right to a jury trial for matters concerning the setting aside of a sheriff's sale. Thus, we do not agree with Wife's argument that, under Rule 3132, where important real estate rights are involved, a request for a jury trial cannot be summarily denied. Our research has revealed no statute or case which compels the result sought by Wife.

In further support of her argument, Wife cites Article I, Section 6 of the Pennsylvania Constitution, which states:

> Trial by jury shall be as heretofore, and the right remains inviolate.

There are, however, limitations: Where no right to a jury trial existed prior to the adoption of the constitution, no right exists now unless one is specifically created by the legislature. . . . Furthermore, Rule 128(f) of the Pennsylvania Rules of Civil Procedure provides:

> In ascertaining the intention of the Supreme Court in promulgation of a rule, the Court may be guided by the following presumptions among others.
>
> (f) that no rule shall be constructed to confer a right to trial by jury where such right does not otherwise exist.

Pa. R.C.P. 128(f), 42 Pa. C.S.A.

S&T Bank by Dalessio v. Dalessio, 429 Pa. Super. at 287, 632 A.2d at 568 (citations omitted).

As in *S&T Bank by Dalessio v. Dalessio*, no statute or case justified the demand for jury trial made by OSC in the instant proceeding. Moreover, as noted by the *Dalessio* Court, Pa. R.C.P. 128(f) specifically provides that no Rule of Civil Procedure shall be constructed to confer a right to trial by jury where such right does not otherwise exist. Accordingly, despite OSC's assertions that the Pennsylvania trial and Superior Courts withheld the application of established case law, existing statutory and decisional law was followed and applied in this case.

III. OSC HAS WAIVED THE ARGUMENT THAT ITS DUE PROCESS RIGHTS WERE VIOLATED BY VIRTUE OF THE TRIAL COURT'S FAILURE TO GRANT A HEARING

OSC's last argument is that the Lackawanna County, Pennsylvania Court of Common Pleas divested OSC of title to land and refused to give it a hearing. This issue, however, has been waived by OSC's failure to comply with the Pennsylvania Rules of Appellate Procedure. Specifically, Pennsylvania Rule of Appellate Procedure 1925(b) provides:

> (b) **Direction to file statement of matters complained of**. The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

Pa. R.A.P. 1925(b).[4]

4. The verbatim text of Pa. R.A.P. 1925 is attached hereto as Appendix B and is incorporated herein.

Although OSC filed a statement of the matters complained of on appeal, it never included the issue of whether the Lackawanna County Court of Common Pleas deprived OSC of due process of law by failing to provide an evidentiary hearing. Accordingly, under Pennsylvania law, this issue was waived and the Pennsylvania appellate courts were precluded from considering the merits of it on appeal. *See, e.g., Feidler v. Morris Coupling Co.*, 784 A.2d 812, 816 (Pa. Super. 2001).

Notwithstanding the waiver of this argument by OSC, however, the Pennsylvania Superior Court and the Lackawanna County Court of Common Pleas acted appropriately and in accordance with the petition practice specified in the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. 206.1, *et seq.*, in refusing to afford OSC an evidentiary hearing.

Under Pennsylvania law, when the record before the trial court is sufficient, as a matter of law, to dispose of a petition, the court is not required to postpone its decision in order to afford a party the opportunity to conduct depositions on disputed factual issues that are not material to the disposition of the petition. *See Cross v. 50th Ward Community Ambulance Co.*, 365 Pa. Super. 74, 83, 528 A.2d 1369, 1373 (Pa. Super. 1987); *Merriam v. Cedarbrook Realty, Inc.*, 266 Pa. Super. 269, 275, 404 A.2d 407, 409 (1978). In the present case, the record before the Lackawanna County Court of Common Pleas was sufficient, as a matter of law, to justify the granting of Zymblosky's Petition and the setting aside of the May 14, 2002 Sheriff's sale.

Specifically, documents filed of record were all that were necessary to make a determination that the May 14, 2002

Sheriff's sale was improperly prosecuted by virtue of the Lackawanna County Sheriff's lack of authority to conduct the sale and/or OSC's fraudulent and overbearing conduct in causing a writ of execution to be issued in an amount greatly in excess of any record judgment. The December 22, 2000 Non-Jury Decision, the January 11, 2001 Exception Order, the January 8, 2002 Clarification Order and the docket revealed that OSC's judgment was in the amount of $6,500.00 and not $184,349.26 as represented by OSC in its praecipe for writ of execution and the Writ of Execution. The motion for clarification filed by OSC on January 12, 2001 with the Lackawanna County Court indicated that prior to the filing of the praecipe for writ of execution and issuance of the Writ of Execution, OSC was unable to calculate Zymblosky's obligation. Moreover, in its motion for clarification, OSC, by its own admission, was clearly aware that it could not "proceed to a final judgment. . . ."

Even though OSC represented that it could not proceed to final judgment until the trial court identified the date on which Zymblosky's rental obligation began, OSC filed a praecipe for writ of execution on August 3, 2001 in which it represented the judgment as being $184,349.26. Accordingly, the filed documents and statements of record were sufficient, as a matter of law, to justify the setting aside of the May 14, 2002 Sheriff's sale and the trial court was not required to postpone a decision on the matter. *See Cross v. 50th Ward Community Ambulance Co.*, 365 Pa. Super. at 83, 528 A.2d at 1373; *Merriam v. Cedarbrook Realty, Inc.*, 266 Pa. Super. at 275, 404 A.2d at 410.

Since the Lackawanna County Court of Common Pleas and Pennsylvania Superior Court properly applied existing Pennsylvania law, OSC's argument that it was denied due process of law is clearly without merit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Rule 3132. Setting Aside Sale

Upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.

APPENDIX B

Rule 1925. Opinion in Support of Order

(a) General rule. Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.

(b) Direction to file statement of matters complained of. The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

(c) Opinions in matters on petition for allowance of appeal. Upon receipt of notice of the filing of a petition for allowance of appeal under Rule 1112(b) (appeals by allowance), the appellate court below which entered the order sought to be reviewed, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order.